Nos. 91-543; 91-558; 91-563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGHENY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER THE COUNTY OF CORTLAND, NEW YORK

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QUESTIONS PRESENTED

1. Whether constitutional principles of federalism expressed in the Tenth Amendment and the Guarantee Clause of the United States Constitution bar Congress from issuing direct commands to the states compelling them to undertake specific waste disposal programs, precluding their withdrawal from the field, and punishing noncompliance by forcibly transferring the waste to the states, as has been done in the Low-Level Radioactive Waste Policy Amendments Act of 1985.

2. Whether the political process adequately protects state sovereignty when Congress avoids political accountability for an unpopular radioactive waste disposal program by shifting the entire financial and administrative responsibility for the program exclusively to the states.

LIST OF PARTIES
TO THE CASE IN THE SECOND CIRCUIT

1. The State of New York, Plaintiff-Appellant

2. The County of Allegany, New York, Plaintiff-Appellant

3. The County of Cortland, New York, Plaintiff-Appellant

4. The United States of America, Defendant-Appellee

5. James D. Watkins, as Secretary of Energy, Defendant-Appellee

6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant-Appellee[1]

7. The United States Nuclear Regulatory Commission, Defendant-Appellee

8. Samuel K. Skinner, as Secretary of Transportation, Defendant-Appellee[2]

9. Richard Thornburgh, as United States Attorney General, Defendant-Appellee[3]

10. State of Washington, Intervenor-Appellee

11. State of Nevada, Intervenor-Appellee

12. State of South Carolina, Intervenor-Appellee

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[1] Kenneth M. Carr, former Chairman of the United States Nuclear Regulatory Commission, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, Ivan Selin, Mr. Carr's successor in office, has been substituted as a party in this proceeding.

[2] Samuel K. Skinner, former Secretary of Transportation, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, Admiral James B. Busey IV, Mr. Skinner's successor in office, has been substituted as a party in this proceeding.

[3] Richard Thornburgh, former United States Attorney General, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, William P. Barr, Mr. Thornburgh's successor in office, has been substituted as a party in this proceeding.

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OPINIONS AND JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated August 8, 1991, is reported at 942 F.2d 114 and is reprinted at 1a of the appendix to the petition for a writ of certiorari submitted by the County of Cortland, New York ("Cortland County").

The opinion of the United States District Court for the Northern District of New York, dated December 7, 1990, is reported at 757 F. Supp. 10 and is reprinted at 18a of the appendix to Cortland County's petition for a writ of certiorari.

The judgment of the United States District Court for the Northern District of New York, dated December 26, 1990, is reprinted at 27a of the appendix to Cortland County's petition for a writ of certiorari.

JURISDICTION

Petitioner Cortland County, together with the State of New York and the County of Allegany, New York, filed this action on or about February 12, 1990. The district court had jurisdiction of the case pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 2201, and 2202. The trial court heard oral argument on dispositive motions on December 7, 1990 and issued an opinion from the bench that day in favor of the defendants. Cortland County filed a Notice of Appeal on or about January 30, 1991. The opinion of the United States Court of Appeals for the Second Circuit, affirming the decision below, was issued on August 8, 1991. Cortland County filed a petition for a writ of certiorari on October 3, 1991, pursuant to 28 U.S.C. § 1254(1). This Court granted Cortland County's petition on January 10, 1992.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves fundamental principles of federalism established in the United States Constitution, especially as expressed in the following provisions:

The Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Guarantee Clause: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4.

The statute challenged in this case is the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j. Pertinent portions of the statute challenged are reprinted at 29a-33a of the appendix to Cortland County's petition for a writ of certiorari.

STATEMENT OF THE CASE

This declaratory judgment action challenges the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPAA"), 42 U.S.C. §§ 2021b-2021j, as violative of constitutional principles of federalism. LLRWPAA is the federal response to the perceived shortage of low-level radioactive waste ("LLRW") disposal facilities that existed in the mid-1980s.

The national effort to expand LLRW disposal capacity began in the late 1970s, following the closure of three of the existing six disposal facilities as a result of serious environmental problems. In furtherance of that effort, the State Planning Council on Radioactive Waste, the National Conference of State Legislatures, and the National Governors' Association ("NGA") submitted recommendations to Congress.

In its final report, the NGA recommended that the states "accept primary responsibility" for the safe disposal of LLRW generated within their borders, "except for waste generated at federal government facilities." J.A.* 114a (NGA Recommendation No.1). The NGA also suggested that Congress "create a special discretionary fund which would confer compensatory and financial benefits to site states and site communities . . . ." J.A. 130a-31a (NGA Recommendation No. 8). In addition, the NGA's report stated unequivocally:

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* "J.A." refers to the Joint Appendix submitted in connection with this proceeding. "C.A. App." refers to the joint appendix submitted to the Court of Appeals for the Second Circuit in connection with the appeal below.

> Federal funds must be made available for site characterization studies, planning grants, and other technical assistance for states to develop regional sites. Such funding should be made available in a manner to encourage development of regional sites.

J.A. 133a (NGA Recommendation No. 9). The NGA appeared to contemplate that six regional disposal sites would be constructed pursuant to their recommendations. *See* J.A. 119a-20a (NGA Recommendation No. 3).

Instead of adopting the recommended policy of *voluntary, primary* state control, with continued federal responsibility for disposal of federally generated waste and substantial federal financial assistance to the states, Congress altogether abdicated its responsibility for the siting and funding of LLRW disposal facilities by transferring that responsibility exclusively to the states. On December 22, 1980, Congress enacted the Low-Level Radioactive Waste Policy Act (the "LLRW Policy Act"), Pub. L. No. 96-573, 94 Stat. 3347, mandating that each state (alone or in a compact with other states) take responsibility for providing for disposal of the LLRW generated within its borders — including some of the waste generated by the federal government. Congress appropriated no funds whatsoever for direct financial assistance to the states.

The LLRW Policy Act set forth a specific timetable for facility development. Congress encouraged compliance by empowering compacts formed pursuant to the statute to exclude waste generated outside the compact region from disposal at the compact facility after January 1, 1986. *See id.* §§ 4(a)(1), 4(a)(2)(B). Nevertheless, in the years following the enactment of the LLRW Policy Act, there was little progress in developing new sites. With the 1986 deadline looming, it became clear that enforcement of the exclusion provision would deny many LLRW generators access to licensed facilities for disposal of their waste.

Consequently, Congress amended the LLRW Policy Act in January 1986, enacting LLRWPAA, which extended the exclusion provision, set new deadlines for facility development, and established stiff monetary sanctions for failure to meet them.

See 42 U.S.C. § 2021e(d). Congress also provided that if a state is unable, by January 1, 1996, to provide for disposal of all commercially generated LLRW produced within its borders, the waste generators may compel the state to take title to their LLRW and either deliver the waste to the state or hold it liable for any damages they incur as a result of the state's failure to take possession. *See* 42 U.S.C. § 2021e(d)(2)(C) (the "Take Title Provision").

While Congress unloaded the onerous duties of disposal onto the states, it perpetuated exclusive federal authority to determine how LLRW should be regulated. The licensing and operations of nuclear power plants, which produce most of the nation's LLRW (by volume and radioactivity), are subject to the sole jurisdiction of the Nuclear Regulatory Commission (the "NRC"). *See* J.A. 51a, 60a. LLRWPAA confers no power upon the states to regulate the generation, treatment, management, transportation, or disposal of LLRW in a manner inconsistent with NRC or Department of Transportation regulations. *See* 42 U.S.C. § 2021d(b)(3).

Indeed, New York's efforts to limit the proliferation of nuclear power plants and the radioactive waste they generate have been repeatedly thwarted by the federal government. Despite New York's sustained and vigorous opposition, the Shoreham nuclear power plant was licensed by the NRC.[1] *See Cuomo v. Nuclear Regulatory Commission*, 772 F.2d 972 (2d Cir. 1985); *Cuomo*

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[1] Much of the litigation concerning the reactor at Shoreham arose out of a dispute over emergency planning. The off-site emergency planning rules adopted by the NRC in 1980, *see* 10 C.F.R. §§ 50.33, 50.47, 50 App. E, established a central role for state and local governments – virtually the only opportunity these governments had to try to stop the plant from opening. *See* Note, *Federalism and Offsite Emergency Planning for Nuclear Reactors: The Shoreham Impasse*, 66 B.U.L. Rev. 229, 256 (1986). Specifically, the rules required that a proposed licensee submit state and local governments' emergency response plans for a proposed nuclear power plant to the NRC as a condition for the issuance of a license for the plant. After Suffolk County concluded that no emergency plan could adequately protect the population living near Shoreham, the county and the State of New York refused to submit such a plan to the NRC. The NRC reinterpreted its rules to circumvent the requirement for state and local participation, and the State sued. (It should be noted that LLRWPAA does not allow state or local governments to block an LLRW disposal facility by withholding an emergency plan.)

v. Long Island Lighting Co., No. 84-4615, slip op. (Sup. Ct. 1985). The City of New York has also unsuccessfully endeavored to restrict the shipment of radioactive material through the city limits. *See City of New York v. United States Department of Transportation*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). Congress has thus deprived the State of any meaningful authority over the production and environmental control of the waste, *see* J.A. 60a-61a, while saddling it (and select counties) with politically explosive, economically risky, and environmentally threatening LLRW disposal obligations.

Under LLRWPAA, the states may, but are not required to, dilute these burdens by entering compacts for operation of regional LLRW disposal facilities. *See* 42 U.S.C. § 2021c. The statute does not, however, require compact members to admit other interested states. *See* Office of Technology Assessment, *Partnerships Under Pressure* 12 n.20 (1989). As a result, LLRWPAA contains no internal limit on the number of disposal sites that may be established pursuant to its mandate. Rather, any state that is unable or unwilling to enter a compact or that cannot contract to send the LLRW generated within its borders to an out-of-state site must build its own facility, irrespective of the environmental suitability of that state as a location for shallow land burial.[6] As such a state, New York is now compelled to develop its own disposal facility in-state.[7]

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[6] To Cortland County's knowledge, the NRC has never licensed any LLRW disposal facility using a disposal method other than shallow land burial. Based on New York's disastrous experience at West Valley, however, that disposal method is now unlawful in New York. *See* N.Y. Envtl. Conserv. Law § 29-0103. Moreover, the NRC has yet to promulgate regulations describing technical and licensing requirements for alternatives to near-surface disposal. States wishing to adopt such alternatives – a drift mine or a deep vertical shaft mine, for example – are therefore forced to work in a regulatory vacuum and run the risk that, at the end of a lengthy research and development process, licenses will not be granted.

[7] Moreover, LLRWPAA's disposal requirement may effectively preclude New York from experimenting with innovative LLRW management techniques, such as long-term storage at the point of generation. *See* 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Hart). On-site storage would, however, be a practical alternative for LLRW management in New York. *See*

(Footnote continued)

Siting activities undertaken pursuant to LLRWPAA's mandate have already caused Cortland County severe financial harm. *See* J.A. 66a-67a. Land values have dropped by as much as 50 percent in the Town of Taylor and other towns in close proximity to the proposed disposal sites. *See id.* at 66a. By September 1990, Cortland County had spent more than $310,000 to participate in the site selection process, and projected costs for continuing involvement were estimated at $300,000 per year. *See id.* at 67a. This projected appropriation far exceeded Cortand County's individual 1990 budgets for Juvenile Delinquent Care, Youth At Risk, Aid to Dependent Children, Alcohol Service, Mental Health, Stop DWI, and the Planning Department. *See id.*

Political heat generated by the selection of unnecessary, expensive, and environmentally unsuitable LLRW disposal sites is predictably directed largely at the state and local officials directly responsible for implementation of the siting process rather than at the federal politicians ultimately responsible for setting it in motion. *See id.* at 67a-69a, 81a-82a. In Cortland County, for example, protesters have repeatedly blocked the Siting Commission's access to the proposed site, and opponents have hounded New York's Governor during his appearances throughout the state. *See id.* at 68a-69a.

In sum, the intrusion upon state sovereignty effected by LLRWPAA is unprecedented. In the instant case, each branch of New York State government – legislative, executive, and judicial – has been conscripted into the service of federal goals. State legislative energies have been diverted to the drafting, debate, enactment, and revision of state LLRW disposal laws that would never have been contemplated but for the enactment of LLRWPAA. *See* J.A. 81a-82a. Congress has also commandeered New York's executive machinery by compelling the State to develop and administer new regulatory programs for

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J.A. 55a-58a. Medical and academic waste can be and often is stored on-site for decay and then disposed of in ordinary landfills. *See id.* at 56a. Nuclear power plants have stored high-level radioactive waste ("HLRW") on-site since they started operation and will probably be required to continue such storage for decades. *See id.* at 57a. Because the utilities produce highly radioactive Class "C" LLRW in very small volumes, that waste could very likely be stored without difficulty in their on-site HLRW storage facilities. *See id.* at 51a-52a.

land disposal. *See* 6 New York Codes, Rules & Regulations Part 382. Finally, New York's judicial processes will be compelled to assume the task of enforcing LLRWPAA's sanctions against the State — even without prior waiver of the State's sovereign immunity.

LLRWPAA's direct orders to the states, which were upheld by the courts below, do not "gradually erase the diffusion of power between State and Nation." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting). Those commands, enforced with extraordinary punitive sanctions, summarily transform the states into instruments of the federal will. Because that incursion upon state sovereignty is inconsistent with fundamental principles of federalism expressed in the Tenth Amendment and the Guarantee Clause of the United States Constitution, the decision of the Court of Appeals should be reversed.

SUMMARY OF ARGUMENT

This challenge of LLRWPAA presents an issue of first impression for this Court: whether Congress may compel the states to exercise governmental functions in an area where they would prefer to remain inactive. All statutes previously reviewed by this Court have merely involved federal efforts to regulate ongoing, voluntary state activity. Because this Court has never addressed the situation presented here, neither the holding nor the theory of federalism developed in *Garcia* (which is indisputably the leading Tenth Amendment case) is directly controlling here. Consequently, this Court may, and should, declare LLRWPAA unconstitutional without applying *Garcia*'s Tenth Amendment standard.

LLRWPAA should be found unconstitutional because the statute violates limits on congressional power inherent in the constitutional structure. This Court has consistently recognized, irrespective of the particular theory of federalism that has governed the Court's decisions at any given time over the past 20 years, that a federal statute that compelled the states to undertake an activity against their will and precluded them from withdrawing from the field would violate constitutional principles of federalism. Because LLRWPAA is precisely such a

statute, the Court should expressly affirm the rule implicit in its prior decisions and declare LLRWPAA unlawful and void.

Even if *Garcia*'s Tenth Amendment standard were to be applied to the circumstances of this case, the Court should find LLRWPAA unconstitutional because the political safeguards intended to protect the sovereignty of the states failed when Congress enacted LLRWPAA. Contrary to the decisions of the courts below, those political safeguards cannot be understood to have fulfilled their function in this case merely because the states had an opportunity to participate in the legislative process. A properly functioning political system requires that Congress remain accountable for its actions when it imposes burdens on the states as states. Because Congress structured LLRWPAA to avoid such accountability, and to defeat the operation of natural political checks on federal power, LLRWPAA violates constitutional principles of federalism.

ARGUMENT

POINT I

LLRWPAA MAY BE FOUND UNCONSTITUTIONAL WITHOUT APPLYING *GARCIA*'S TEST FOR VIOLATIONS OF PRINCIPLES OF FEDERALISM

During the past 20 years, this Court has twice overruled Tenth Amendment cases, and, in so doing, has completely recast the standard governing Tenth Amendment challenges to federal acts. *See Garcia* (overruling, in 1985, *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *National League of Cities* (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)). *National League of Cities* established four conditions for immunity from federal regulation under the Commerce Clause:

> First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the

> relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission."

Garcia, 469 U.S. at 537 (quoting *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 & n.29 (1981) (quoting *National League of Cities*, 426 U.S. at 845, 852, 854)). The Court rejected this test (the "Traditional Function Test") in *Garcia* and sought a standard that did not rely upon "predetermined notions of sovereign power." *Garcia*, 469 U.S. at 550.

The *Garcia* Court located the first line of defense for state sovereign interests in the "procedural safeguards inherent in the structure of the federal system" rather than in substantive exceptions from the commerce power. *Id.* at 552. The Court concluded that:

> the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate "a sacred province of state autonomy."

Id. at 554 (quoting *Equal Employment Opportunity Commission v. Wyoming* ("*EEOC*"), 460 U.S. 226, 236 (1983)). In recognizing the possibility of failure, the Court adumbrated a new test (the "Process Failure Test") for violations of constitutional principles of federalism. As is explained below, the Process Failure Test does not apply under the circumstances of this case.

A. *LLRWPAA Compels the States to Exercise Governmental Actions in an Area Where They Choose to Remain Inactive*

The coercive effect of LLRWPAA is evident on the face of the statute. The statute provides in unequivocal terms: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of" LLRW. 42

U.S.C. § 2021c(a)(1). No state is exempt from LLRWPAA's requirements; no state may cede the field to federal regulatory authorities; no state may transfer its federally imposed responsibilities to private generators of LLRW.

LLRWPAA also expressly provides:

> By July 1, 1986, each [state that is not a member of a compact region] shall ratify compact legislation, or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within the State.

42 U.S.C. § 2021e(e)(1)(A). Thus, Congress has issued direct orders to the legislature or highest executive officer of each non-compact state, commanding specific action with respect to the establishment of a LLRW disposal facility. The statute also specifies in detail the contents of the siting plan that must be prepared by each of those states. *See id.* at § 2021e(e)(1)(B)(ii) and (iii). These are additional non-delegable duties imposed upon the states by the statute.

LLRWPAA thus does not merely require the states to *weigh* federal regulatory proposals governing *voluntary* state activity, as was the case in *Federal Energy Regulatory Commission v. Mississippi* ("*FERC*"), 456 U.S. 742 (1982). LLRWPAA sets "a mandatory agenda to be considered in all events by state legislative or administrative decisionmakers," *id.* at 769, and compels the states to *promulgate* congressionally prescribed laws or regulations to govern the states' *involuntary* participation in the LLRW disposal business. The fact that the statute affords some flexibility on administrative or technical matters does not mitigate the intrusion effected by LLRWPAA's "interference in the States' legislative processes, the heart of their sovereignty." *Thompson v. Oklahoma*, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting).

Indeed, the federal government compounds the intrusion effected by LLRWPAA by forcing the states to operate in a

regulatory vacuum.[8] The specific "technical requirements for alternative methods" of LLRW disposal, promised for years by the NRC, 10 C.F.R. § 61.7, have yet to materialize. States may have traditionally served as "laboratories for . . . experiment," *Garcia*, 469 U.S. at 546, but Congress impermissibly intrudes upon state autonomy when it compels the states to develop disposal alternatives without adequate technological guidance.[9] *See FERC*, 456 U.S. at 777 ("State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study.") (O'Connor, J., concurring in the judgment in part and dissenting in part).

In addition to the affirmative disposal obligations imposed by LLRWPAA, the statute contains a novel and extreme penalty for a state's failure to provide for such disposal by 1996. The statute compels the state to take title to and possession of all LLRW offered to it from generators and owners producing such waste in the state or to assume liability for all damages incurred by those generators and owners as a result of the failure to accept that waste. To our knowledge, LLRWPAA is the first federal statute in the history of this nation seeking to impose such a liability on the states.[10]

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[8] The mere availability of a "technical position" on licensing alternative methods of disposal or of a standard guide review plan for the construction of earth covered cement vaults and bunkers, *see* C.A. App. 166, does not provide the sort of detailed regulatory structure required by states such as New York that are considering alternatives such as drift mines or deep vertical shaft mines.

[9] The lack of adequate technical guidance is especially burdensome when the physical features of a state — its hydrology, geology, and climate — are not conducive to radioactive waste disposal. *See* J.A. 59a.

[10] The extent of the liability that can be incurred as a result of taking title to and possession of radioactive waste is illustrated in *Amoco Oil Company v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), where remedial costs for minor radioactive contamination at just one small site were estimated at $11-17 million.